INDEX

CITATIONS

634917—45

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 930

PAUL FRANZ FREDERICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 213–214) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered December 15, 1944 (R. 214), and a petition for rehearing (R. 215–219) was denied January 15, 1945 (R. 220). The petition for a writ of certiorari was filed February 8, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended

by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

The sole question presented is whether there is sufficient evidence to sustain petitioner's conviction.

STATUTE INVOLVED

Title I, subch. III, § 346 of the Nationality Act of 1940, 54 Stat. 1163 (8 U. S. C. 746), provides in part:

> (a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the Government of the United States or not—
>
> * * * * *
>
> (18) Knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States.
>
> * * * * *
>
> (d) Any person violating any provision of subsection (a) of this section shall be fined not more than $5,000, or imprisoned not more than five years, or both.

STATEMENT

On March 15, 1943, petitioner, an alien, was indicted in the District Court of the United States for the Southern District of Texas (Case No. 8534) in two counts charging violations of

Title I, subch. III, § 346 of the Nationality Act of 1940. The first count alleged that on or about December 27, 1941, petitioner knowingly, wilfully, and unlawfully represented himself to be a citizen of the United States before a deputy collector and assessor of taxes of Harris County, Texas, "in applying for a poll tax"; and the second charged that he also misrepresented himself to be a citizen on July 25, 1942, before an election judge of Harris County in applying for a ballot to vote. (R. 3–4.) After a trial on this indictment by the court without a jury he was convicted on the first count and acquitted on the second (*United States* v. *Frederick*, 50 F. Supp. 769; see also Pet. 2). Thereafter, the trial judge granted him a new trial on the first count as the result, apparently, of a letter to the judge by a Mrs. Blissard, the Government's principal witness as to that count (see R. 12–13, 21–22, 48; Pet. 3).[1]

On September 9, 1943, a second indictment in one count was returned against petitioner (Case No. 8690) charging that on April 4, 1942, he knowingly, wilfully, and unlawfully misrepresented himself to be a citizen in applying to an election judge for a ballot to vote in an election for school trustees (R. 5–6).

On April 3, 1944, the first count of Indictment 8534 and the single count of Indictment 8690, were

[1] The proceedings of the first trial are not included in the record.

consolidated for trial (R. 6) and at petitioner's request, and with the approval of the court and the United States Attorney, he was tried by the court without a jury (R. 6–7). The court found petitioner guilty upon both counts (R. 12–13) and sentenced him to imprisonment for a term of sixty days upon each, the sentences to run concurrently (R. 21–23). Upon appeal to the Circuit Court of Appeals for the Fifth Circuit, the convictions were affirmed, "but without prejudice to the right of Defendant to apply within thirty days of the receipt of the mandate in the lower Court for a suspension, or reduction, of sentence" (R. 213–214).

The evidence relating to the two counts involved in this case is, in summary, as follows:

Petitioner was born in Germany in 1899. He came to this country in 1923 (R. 83, 136, 146) and was an alien at all times material herein (R. 83–84, 90–92).[2]

On December 27, 1941, petitioner paid at the office of the Assessor and Collector of Taxes, Harris County, Texas, a local property tax upon property registered in his wife's name (R. 44, 47–48, 53, 55–58, 139, 148, 149). He then offered to pay.

[2] Petitioner registered as an alien with the Department of Justice, Immigration and Naturalization Service, under the Alien Registration Act (8 U. S. C. 451 *et seq.*) on December 5, 1940 (R. 83–85), and on February 12, 1942, he again indicated his alien status in applying for an enemy alien certificate of identification (R. 90–91). On January 21, 1943, petitioner filed a petition for naturalization (R. 92).

and paid, two poll taxes, one for himself and one for his wife, a native-born citizen of the United States (R. 44, 45, 51). This was the first time he had ever paid a poll tax for himself, although he had paid the property tax and a poll tax for his wife in prior years (R. 57–58, 148).[3] He was admittedly aware that he could not vote unless he paid a poll tax (R. 157), and claimed to have been under the impression that a poll tax receipt would entitle him to vote "in bond issues or trusteeship elections," but not in national elections or in "primaries" (R. 154–156).

Mrs. Blissard, the deputy tax collector (R. 41) who prepared the poll tax receipt for petitioner (R. 47), could not identify petitioner solely on the basis of his appearance before her on December 27, 1941 (R. 53, 58), and could not "say exactly what I did in that special case" (R. 52), but stated that she "must have asked him" the various questions necessary to supply the information called for by the poll tax receipt (R. 52, 53). Mrs. Blissard admittedly asked petitioner his name, address, age, length of residence in the state, county and city, occupation and place of

[3] Both citizens and aliens are required to pay a poll tax in Texas if they own property in the state (R. 53–54, 139, 148, 149).

Petitioner testified: "* * * I rendered my property at the same time I paid the tax and it was told me that I had to buy a poll tax before I could render my property and pay the tax" (R. 139, 148). The record shows that the property in question was entirely in the name of petitioner's wife (R. 56, 148).

birth (R. 45–46, 102–103, 139, 149). With reference to his place of birth, petitioner admittedly replied that it was Germany (R. 46, 47, 139). She then, she testified, asked him whether he was "naturalized" and he replied in the affirmative (R. 46).[4]

On about April 4, 1942 (R. 61), petitioner and his wife appeared at Price's Service Station, at an election of school trustees (R. 120, 144). Petitioner there presented to a Mrs. Blevins, a poll tax receipt (R. 62, 64, 65) which indicated that he was a naturalized citizen of the United States (R. 65–66, 79). Mrs. Blevins had "a poll list," and when petitioner presented to her the poll tax receipt which "said he was a naturalized citizen" (R. 65–66, 68–69; see also R. 184–185), she wrote his name "on the papers that I was supposed to write it on" (R. 64). She admitted, however, that petitioner never directly stated to her that he was a citizen of the United States (R. 77, 78, 80).

Petitioner testified that he "couldn't say if I did or if I didn't" vote in the election on April 4, 1942, that he was interested in its outcome and brought some people there, and that his wife had

[4] Mrs. Blissard testified that petitioner "said he was" when she asked whether he was naturalized (R. 46). On re-cross-examination she testified that petitioner said "yes" in answer to her question, "You are naturalized?" (R. 210), and, again, that in answer to this question, petitioner "nodded his head" (*ibid.*).

told him she thought he did vote on that occasion (R. 144–145, 154, 156). At his previous trial (see p. 3, *supra*), petitioner admitted that he had voted at this election (R. 155, 156).[5]

In a written statement dated January 19, 1943 (R. 109), petitioner stated that "my wife says I voted at an election for school trustees about one year ago and I guess I did, held at Jack Price's filling station on Market Street at Cloverleaf Farm Addition. I did not want the people in my community to know that I am not a citizen because of my family. When I have been asked about whether I am a citizen I have not said I am or that I am not. I have only voted on the two occasions, that is in the school trustee election mentioned above and in the primary election in July 1942" (R. 109).[6]

---

[5] Petitioner also admitted in a statement signed on January 16, 1943, that he attended a "primary election" in July 1942 at Galena Park School. Petitioner drove there with his wife and when he "went in I presented my poll tax receipt & was furnished a ballot. I took the ballot over to the voting table and voted. I erased my voting number on the ballot. I gave the ballot to the man standing beside the ballot box and asked him not to stamp it. He still had the ballot on the table when I left. My wife and Mr. Blevins also voted and we left" (R. 102–105; see also R. 170–171).

[6] While petitioner at first testified that the last quoted sentence was added to his written statement after he had signed it (R. 141) and thereafter (R. 157–159) indicated that the written statement did not accurately represent his oral statements upon which it was based, his own testimony as a whole negates his earlier assertions (R. 157–161, 164–166).

While it appears that petitioner was somewhat hard of hearing (R. 145, 206–207), petitioner, testifying in his defense, conceded that he answered all the questions of Mrs. Blissard, the tax collector, on December 27, 1941, except that relating to his citizenship status (R. 139–140, 149). He denied, however, that he told Mrs. Blissard that he was a naturalized citizen, or that he was asked any question concerning his citizenship status (R. 138–140, 149). Petitioner denied also that he ever told Mrs. Blevins that he was a citizen of the United States (R. 138, 153), and testified that he had informed both Mr. and Mrs. Blevins that he was not a citizen of the United States and that "I was making my final papers" (R. 143, 153). The final papers were not filed, however, until January 21, 1943 (R. 92). Petitioner also testified that he did not remember ever having voted in this country (R. 160).

Several witnesses testified that petitioner's reputation for honesty and truthfulness was good (R. 151, 194; see also R. 175–176, 199, 204–205), and other witnesses testified that he never represented to them that he was a citizen of the United States (R. 189, 191, 194, 196, 203–204).

ARGUMENT

This case has become colored by the injection of issues wholly irrelevant to the one actually involved. Whether petitioner was entitled or not to purchase a poll tax receipt (see Pet. 14–15), he

was not prosecuted for that. The prosecution may have developed, as he indicates, out of a "bitter neighborhood squabble" (Pet. 19) and thus have been, as the circuit court of appeals states, "suggestive of a witch hunt" (R. 214), but that does not warrant the overturning of petitioner's conviction if there was enough evidence. The alleged animosity of the Government's principal witnesses (Pet. 17, 19), although evidently it was through the intercession of one of them that petitioner was granted a new trial on one of the counts (Pet. 3–4), is also irrelevant on appellate review. Further, it is immaterial under the statute whether an offender gains an advantage from his misrepresentation of citizenship or has some ulterior motive in making the misrepresentation (Pet. 13, 15, 17, 19), for the statute provides for penalization merely if the misrepresentation is "knowingly" made (*supra*, p. 2). And, while the opinion of the circuit court of appeals leaves little doubt that those judges would not have convicted petitioner if they had been in the place of the trial judge, since they felt that the evidence left them "with more dubiety than certainty", they nevertheless felt impelled to state, after their examination of the evidence, that "we are unable to say that the verdict of the judge * * * was not supported by sufficient evidence" (R. 214). This was not, as petitioner insists (Pet. 20–22), a negation of the "reasonable doubt" rule; it was but the recognition of the principle that an

appellate court may not substitute itself for the fact-finding instrumentality, the jury, or the judge in a jury-waived case; that the appellate function is merely to ascertain whether there was enough evidence of substantiality to permit the fact-finder to embark upon the determination of guilt or innocence. The question in this case is, therefore, simply whether the evidence authorized such a determination.

The litigation in the trial court turned upon the question of the credibility of the testimony pro and con. The trial judge, of course, saw and heard the witnesses. It is evident that he believed the testimony adduced by the Government. There can be no doubt that the evidence, with the inferences which may properly be drawn therefrom, furnished a substantial evidentiary basis for his decision that on two occasions petitioner knowingly misrepresented himself to be a naturalized citizen.[7]

While the evidence showed at least a technical violation of the statute by petitioner on two occasions, the permission accorded by the circuit court of appeals to petitioner to seek, upon remand, reduction or suspension of sentence (R. 214), was, it seems to us, not inappropriate in view of the circumstance that petitioner may have been the victim of a neighborhood squabble.

[7] Since petitioner's 60-day sentences are to run concurrently, his conviction is, of course, not vulnerable if he was properly convicted upon either count. *Hirabayashi* v. *United States*, 320 U. S. 81, 105, and cases cited.

CONCLUSION

While the case is not an attractive one, we cannot say the decision below is incorrect, and we therefore respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
W. MARVIN SMITH,
Special Assistant to the Attorney General.
ROBERT S. ERDAHL,
WILLIAM STRONG,
Attorneys.

MARCH 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945